Nos. 05-1589, 05-1657

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IN THE

Supreme Court of the United States

GARY DAVENPORT, *et al.*,
Petitioners,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

WASHINGTON,
Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Washington

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

The federal government and the great majority of the states regulate union and corporate political contributions and expenditures in various ways and to various degrees. Of all these jurisdictions the State of Washington *alone* has made it unlawful for a union to finance what would otherwise be lawful political advocacy as a matter of state law (and what is lawful political advocacy financed with treasury funds by corporations)—including contributions in support of or in opposition to ballot propositions, independent political expenditures, and internal political communications—from a general fund made up primarily of union members' dues moneys and secondarily of employee-nonmembers' agency fee payments, unless the union has secured the affirmative consent of each individual payer of an agency fee to the financing of the union's political advocacy through the union's treasury moneys. Washington does so even though the interest of the employee-nonmembers who pay agency fees, which is asserted as justifying the prohibition, is already protected by the fee-payers' constitutional "objection" right not to pay the union an amount equal to the portion of union dues that goes for the union's political and other expenditures not germane to collective bargaining.

The question thus presented is:

Whether, as the Washington Supreme Court held, the State of Washington's *sui generis* regulation of union political expression through Wash. Rev. Code § 42.17.760 impermissibly burdens the First Amendment right of unions and their members to free speech by creating an "insurmountable . . . hurdle[] . . . to engag[ing] in political speech" that is not narrowly tailored to advancing any compelling governmental interest?

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Education Association is organized as a nonprofit corporation. It has no parent corporation, and no publicly held company owns any stock in it.

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BRIEF IN OPPOSITION

Respondent Washington Education Association respectfully urges the Court to deny the above-styled Petitions for Writ of Certiorari, both of which seek review of the decision of the Washington Supreme Court in *State ex rel. Washington State Public Disclosure Commission v. Washington Education Association*, 130 P.3d 352 (Wash. 2006).

STATEMENT

A. The Washington Education Association ("WEA") is a labor organization which, through its 370 local affiliates, acts as the exclusive bargaining representative of over 70,000 teachers and other educational employees of public school districts, community colleges, and universities in the State of Washington under Washington's Educational Employment Relations Act, Wash. Rev. Code §§ 41.59.010 *et seq.*, and other statutes governing public employment.[1]

Like most labor organizations, WEA works to advance the interests of the employees it represents through a variety of forms of concerted activity, ranging from the negotiation and enforcement of collective bargaining agreements to political advocacy. During the years at issue in this litigation, WEA's political advocacy expenditures required to be reported to the state Public Disclosure Commission varied between 0.5% and 3.2% of its total expenditures.

Just over 95% of the employees WEA represents have chosen to join WEA as union members and pay union dues into WEA's general fund from which the union finances its activities. The remainder of those employees, fewer than 5%, have chosen not to become WEA members (and consequently have no obligation to pay such dues).

Washington law requires that a public-sector union like WEA represent the employee-union members and the employee-nonmembers in its bargaining units on an equal basis. Wash. Rev. Code §§ 41.59.090, 41.56.080, 41.76.015. To

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[1] The vast majority of the employees represented by WEA are covered by the Educational Employment Relations Act, which applies to certificated employees in elementary and secondary schools. Classified employees are subject to the Public Employees' Collective Bargaining Act, Wash. Rev. Code §§ 41.56.010 *et seq.*, while the labor relations of community college and university faculty members are governed respectively by Wash. Rev. Code §§ 28B.52.010 *et seq.* and §§ 41.76.001 *et seq.*

spread the financial burden of this required equal representation among union members and nonmembers, Washington—like approximately half of the states—allows public-sector unions to negotiate collective bargaining agreements that require payment of an "agency fee" to the union by the employee-nonmembers the union is required to represent. Wash. Rev. Code § 41.59.100; *see also id.*, §§ 28B.52.045, 41.56.120, 41.76.040. Washington statutes allow the collection of an agency fee in an amount "equal to the fees and dues required of membership in the [union]." Wash. Rev. Code § 41.59.060(2); *see also id.*, § 41.59.100.[2] Under the statutes covering the vast majority of the employees WEA represents, the employer implements the agency fee provision by deducting the agency fee from the employee-nonmember's salary payments and remitting it to the union. Wash. Rev. Code §§ 41.59.100, 41.76.045(2), 28B.52.045(2).

This Court has long recognized the important public purposes served by an agency fee system and the permissibility of that system under the First Amendment. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-22 (1977). At the same time, in deference to the employee-nonmembers' First Amendment nonassociational rights, the Court has ruled that employee-nonmembers who have an objection to paying for a union's political and ideological activities can only be required to pay a reduced agency fee that is equal to the portion of union dues that is expended for purposes germane to collective bargaining and thus is constitutionally "chargeable" to objecting nonmembers. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). In addition, the Court has held that unions that have negotiated an agency fee provision must give employee-nonmembers notice of the amount and nature

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[2] While lacking this explicit language of the Educational Employment Relations Act, the other relevant labor relations statutes similarly impose no limit on the agency fee a union may collect. *See* Wash. Rev. Code §§ 28B.52.045(2), 41.56.122(1), 41.76.045(2).

of the union's "chargeable" and "nonchargeable" expenditures and the opportunity to register their objection to paying the portion of union dues that corresponds to the union's expenditures that are not germane to its collective bargaining functions. *See generally Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Consistent with these constitutional requirements, WEA annually provides each employee-nonmember subject to an agency fee requirement with a "*Hudson* notice" explaining the union's breakdown of its chargeable and nonchargeable expenditures for the relevant fiscal year and offering, to any nonmember who informs the union of his or her objection, a reduction in the fee corresponding to the nonchargeable expenditures.[3]

Payroll deductions received by WEA from employers, consisting of the union dues of members and the agency fees of nonmembers, are deposited in WEA's general fund. Just over 95% of the WEA general fund's receipts come from union members' dues, and just under 5% from nonmembers' agency fees. WEA makes its various disbursements, including the political expenditures that are at issue in this litigation, from its general fund.

B. In 1992 Washington voters adopted through Initiative 134 a Fair Campaign Practices Act, codified in Title 42, Chapter 17 of the Washington Revised Code. Section 760 of the Act, at issue in this litigation, provides as follows:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

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[3] In addition, feepayers who so request are entitled to a review by an independent arbitrator of the union's calculation of the chargeable percentage of its expenditures.

Wash. Rev. Code § 42.17.760 [hereinafter "Section 760"]. Section 760's restriction on political contributions and expenditures extends not only to contributions to political candidates and to expenditures relating to elections for public office, but also to contributions and expenditures relating to ballot initiatives and referenda. *See id.*, § 42.17.020(17) (defining "election" to include any "election for public office and any election in which a ballot proposition is submitted to the voters"); *id.*, § 42.17.020(38) (defining "political committee" as an entity making expenditures "in support of, or opposition to, any candidate or any ballot proposition").

C. Prior to 2000 and the institution of this litigation, the Public Disclosure Commission ("PDC")—the administrative agency charged with administration and enforcement of the Fair Campaign Practices Act, *see* Wash. Rev. Code §§ 42.17.350 *et seq.*—had never sought to enforce Section 760, nor had that section been the subject of any judicial interpretation, agency rulemaking, or other guidance from the PDC. *See* Pet. App. 9a.[4] Then, in October 2000, the Washington Attorney General, upon referral from the PDC, brought this case against WEA in Thurston County Superior Court. The complaint alleged violations of Section 760 between 1996 and 2000 based on WEA's political expenditures and on its contributions to political committees supporting or opposing various ballot propositions—such as ballot questions on education-related public policy issues concerning charter schools, private school vouchers, and class size reduction in the public schools.[5]

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[4] Except as otherwise noted, appendix citations are to the Appendix submitted by petitioner in No. 05-1657.

[5] WEA's political contributions at issue do not include any contributions to candidates for public office. Such candidate contributions were not made from WEA's general treasury but instead by its political action committee WEA-PAC, which was funded by separate earmarked contri-

In its initial ruling, the trial court held (i) that Section 760 was constitutional; and (ii) that an agency fee payer's failure, in response to WEA's "*Hudson* notice," to file an objection and request a reduction in his or her agency fee corresponding to WEA's nonchargeable expenditures—a broader category than the political disbursements identified by Section 760—did not constitute "affirmative authorization" within the meaning of the statute. Pet. App. 115a.

An ensuing bench trial focused on the question of whether, by making political expenditures and contributions from its general fund, WEA had "used" agency fees for those purposes. Two of the three accountants to testify at trial, including an independent expert jointly retained by the parties, opined that, under the circumstances at issue in this case, the mere commingling of agency fees in WEA's general fund was an insufficient basis for concluding that WEA had "used" such fees for the political purposes identified by Section 760. *See id.* at 53a-54a. Notwithstanding that testimony, the trial court concluded that "when agency fees were commingled with other funds in the general treasury, expenditure of any general treasury monies to influence an election or support a political committee results in use of a proportionate share of agency fees for such purposes." *Id.* at 99a.

Having found a violation of the statute, the court imposed as a "punitive sanction" a civil penalty of $400,000 plus costs and attorney's fees. *Id.* at 111a-112a. The court also entered a permanent injunction requiring WEA in future years to reduce the fee to be paid by (nonobjecting) agency feepayers by "the percentage of the WEA's total expenditures that are analyzed to have been used for § 760 expenses in the second fiscal year prior" plus a "cushion" of 3 percent. *Id.* at 88a-

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butions of WEA members. WEA-PAC contributions and expenditures are not at issue in this litigation.

89a. The injunction defined Section 760 expenses to include "all political advertising expenditures, as well as direct and in-kind contributions, internal political communications, and independent expenditures." *Id.* at 85a.

In the meantime, five agency feepayers, petitioners in No. 05-1589, brought a class action lawsuit against WEA in the same court, asserting an implied private right of action under Section 760 as well as various tort theories—all predicated on the alleged violation of Section 760—and seeking to recover portions of the agency fees they had paid. The trial judge dismissed one of the tort claims, allowed the others to go forward, certified a class as to certain claims, and stayed further proceedings while certifying his ruling for interlocutory appeal. *Davenport* Pet. App. 45a.

The two cases were heard together on appeal. WEA raised multiple issues, including the constitutionality of Section 760, whether WEA's *Hudson* process constituted the "affirmative authorization" required by the statute, whether under the circumstances agency fees had been "used" for political purposes, whether any violation of the statute had been intentional, and—as to the *Davenport* case—whether plaintiffs had stated a cause of action under Section 760 and their various tort theories. The court of appeals reached only the first of these issues, relying on this Court's agency fee jurisprudence to hold Section 760 unconstitutional. Pet. App. 48a; *see also Davenport* Pet. App. 42a.[6]

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[6] Judge Hunt disagreed with the majority's view that the statute was unconstitutional, *see* Pet. App. 70a-77a, but—finding that WEA had had a good faith basis for its belief that it had complied with the statute—she concurred with the majority in holding that all penalties against WEA should be vacated. *Id.* at 78a. In the *Davenport* case, Judge Hunt concurred in the result, holding that the trial court's ruling should be reversed on the basis of an intervening appellate decision holding "that '42.17 RCW does not imply a private cause of action.'" *Davenport* Pet. App.

The Washington Supreme Court granted discretionary review and affirmed the judgment of the court of appeals. Pet. App. 1a. The court addressed two issues. It first held that, while the statutory requirement of "affirmative authorization" did not mean *written* authorization, and while "the State was unable to specify what form of authorization would satisfy the requirement of affirmative authorization," *id.* at 11a, a feepayer's "[f]ailure to respond to the *Hudson* packet ... would not fulfill the affirmative authorization requirement." *Id.* at 10a.

The Washington Supreme Court therefore turned to the question whether the statute, so construed, was constitutional. Answering that question in the negative, the court below held that Section 760 burdened the right of WEA and its members to engage in political speech and did so without narrow tailoring to a compelling governmental interest. *Id.* at 26a-27a, 32a-34a.

ARGUMENT

The certiorari petitions do not present any legal question of general importance warranting this Court's review. The Washington Supreme Court applied well settled constitutional principles to invalidate a *sui generis* Washington state statute that cuts deeply into the right of unions like WEA to engage in political speech through such means as political advertising and internal political communications, and that has no analogue in federal, or any other state, campaign practices law. The Washington court's decision is, moreover, carefully limited to the unique aspects of that Washington state statute. Precisely because that is so, and contrary to the certiorari petitions' claims, the Washington Supreme Court's decision is plainly not in conflict with any of the decisions of other

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43a-44a (citing *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 60 P.3d 652 (Wash. Ct. App. 2002)).

courts cited by petitioners. The certiorari petitions should therefore be denied.

I.

The State of Washington, in common with many other states, permits unions and corporations to finance a wide range of political advocacy out of the union's or corporation's treasury money in its general fund.[7] But through Section 760 the State of Washington *alone* limits that permission by making it unlawful for a union to finance what would otherwise be lawful political advocacy out of a general fund made up primarily of its members' dues and secondarily of agency fee moneys—unless the union has secured the affirmative consent of each individual payer of an agency fee to the financing of the union's political advocacy through the union's treasury.

A. As the Washington Supreme Court recognized, and as is apparent on the face of things, Section 760 cuts deeply—and discriminatorily—into the First Amendment associational right of unions like WEA to engage in political advocacy that is financed almost entirely by members' dues moneys and only to a very small extent by agency fee moneys. In practical terms, Section 760 would silence the political advocacy of the unions like WEA that finance their advocacy out of general funds that consist overwhelmingly of members' dues money, by creating the "insurmountable . . . hurdle[]," Pet. App. 19a, of securing the affirmative consent to engage in such advocacy of each and every one of the individuals who pays an agency fee into the union's general fund.

Moreover, the Washington Supreme Court was surely on solid doctrinal ground in recognizing that this unique draconian restriction on the First Amendment rights of WEA to use

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[7] *See State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 999 P.2d 602, 611 (Wash. 2000).

its general treasury funds for independent political expenditures and for contributions supporting or opposing ballot initiatives could pass constitutional muster only if it was justified by a compelling governmental interest and was narrowly tailored to protecting that interest. *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479, 2487-89 (2006); *First National Bank v. Bellotti*, 435 U.S. 765 (1978). And, it is difficult—we would say all but impossible—to fault the Washington court's highly particularized conclusion that Section 760 fails that constitutional test.

The court below rejected as "disingenuous" the State's contention "that § 760 has no impact on the First Amendment rights of [union] members" and their "ability to assert their collective political voice." Pet. App. 19a. Citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), the Washington court observed that "[c]ampaign finance legislation can create insurmountable organizational and financial hurdles for organizations attempting to engage in political speech, rendering the legislation unconstitutional." Pet. App. 19a. Here, the court below explained, "the statute acknowledges that the fees are in the union's possession but places restrictions upon the *use* of the union's funds for political speech." *Id.* at 30a-31a (emphasis in original). Such "a restriction on the First Amendment rights of WEA must be justified by a *compelling* governmental interest." *Id.* at 26a (emphasis in original). And here "the only interest asserted is additional protection for nonmembers' First Amendment rights." *Id.*

That interest, the Washington court held, was fully protected by the *Hudson* process that WEA already provided in compliance with the requirements of the First Amendment, and was not advanced any further by Section 760's "affirmative authorization" requirement. As the court explained, "[t]he constitutionally acceptable opt-out alternative . . . reveals that protection of dissenters' rights can be achieved

through means significantly less restrictive of the union's associational freedoms than RCW 42.17.760's opt-in requirement." *Id.* at 33a. For this reason the court appropriately held that Section 760 was not narrowly tailored to advance the state's legitimate interests, and therefore was unconstitutional. *Id.* at 33a-34a.

B. Not only was the Washington Supreme Court correct in invalidating the Washington state statute at issue here, but for present purposes it is equally to the point that the Washington court's decision raises no question of general significance.

The federal government and the great majority of the states regulate union and corporate political contributions and expenditures in various ways and to various degrees. But neither the federal government nor any other state has ever imposed a regulation on union (or corporate) political advocacy comparable in its purpose and effect to Washington's Section 760.[8] Section 760 is indeed unique among state and

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[8] Nowhere in their papers do petitioners identify any comparable statute from another state, and our research has disclosed none. The *Davenport* petitioners do cite statutes from Maryland and Montana which they say "prohibit the use of nonmember fees on political activities or contributions." *Davenport* Pet. at 9 n.8 (citing Md. Code Ann., Educ. § 6-504(d)(3)(iv)(2); Mont. Code Ann. §§ 39-31-402(3); 39-32-109(2)(d)).

But the Maryland statute (which applies only to noncertificated education employees in Baltimore County)—like agency fee statutes in several other states—limits the agency fee a union may collect to the portion of union dues that corresponds to the union's constitutionally "chargeable" expenditures (thus excluding political expenditures). *See* Md. Code Ann., Educ. § 6-504(d)(3)(iv)(1). In contrast to Section 760, therefore, the Maryland statute does not restrict a union's political expenditures financed from dues and fees it has lawfully collected.

The Montana statutes make it an unfair labor practice for a union to "use agency shop fees for *contributions to political candidates or parties*." Mont. Code Ann. § 39-31-402(3) (emphasis added). In contrast to Section 760, the Montana statutes do not reach a union's right to make

federal efforts to regulate union political expenditures in this manner.

And, as we have also noted, the Washington Supreme Court limited itself to determining the constitutional validity of the State of Washington's unique regulation through Section 760 of union political advocacy. The Washington court's decision invalidating Section 760 has no direct application to any federal, or to any other state, regulation of union (or corporate) political advocacy on the books. Nor, given its focus on the unique nature of Section 760, does the decision below so much as throw a cross light on the validity of any such federal or state regulation of union (or corporate) political advocacy. It is not, in short, a decision that warrants review by this Court.

II.

As we have stressed, the issue posed by Section 760 and decided by the Washington Supreme Court is whether the State of Washington impermissibly burdened the First Amendment right of unions like WEA to engage in political advocacy financed out of a general fund consisting primarily of members' dues moneys and secondarily of agency fee moneys, by requiring the union to secure the affirmative consent to engage in such advocacy of every one of the individuals who pays an agency fee. None of the decisions cited in the certiorari petitions as being in conflict with the Washington Supreme Court's decision treat with an election campaign practices regulation in any way comparable to the Washington state regulation at issue. And, not surprisingly, none of those decisions, in passing on the validity of the

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independent political expenditures, to make contributions in support of or in opposition to ballot propositions, or to engage in internal communications with its members. And, as we discuss below, Section 760's great breadth of application is of critical importance in assessing the statute's constitutionality.

regulations there at issue, does or states anything contrary to the Washington court's decision here.

The cases on which the petitioners rely for their assertion of a conflict fall into several distinct groups, which we address in turn.

A. ***Agency Fee Cases.*** First and foremost, both sets of petitioners rely on *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). *Washington* Pet. at 17-20; *Davenport* Pet. at 17-20; *see also id.* at 18 n.15 (citing similar state cases). As petitioners say, *Lincoln Federal* stands for the proposition that a union has no constitutional right to collect an agency fee in the first place. That rule of law is as undisputed as it is irrelevant to this case. The issue here is not the right of unions to *collect* an agency fee from nonmembers; that right is established by Washington statutory law and is undisputed. Rather, the issue is the union's right to engage in political expression financed out of the member dues and agency fees the union has lawfully collected. Nothing in *Lincoln Federal* so much as speaks to that question.

B. ***Dues Checkoff Cases.*** The second line of cases on which petitioners rely—those typified by *South Carolina Education Association v. Campbell*, 883 F.2d 1251 (4th Cir. 1989), that address the constitutionality of statutes limiting or prohibiting the use of payroll deduction for the collection of union dues and agency fees—has even less relevance to the matter at hand. These cases hold, as petitioner Washington puts it, "that the First Amendment does not impose any obligation on government to assist unions in collecting union dues or agency shop fees by granting payroll deductions so that the fees and dues can be withheld from employees' pay by the employer and paid directly to the union." *Washington* Pet. at 19 n.4 (citing cases); *see also Davenport* Pet. at 11-13 (citing cases). The dues checkoff cases, in short, address the constitutionality of limits placed on unions' ability to demand

assistance from public employers in collecting their dues and fees. These cases have nothing to say, directly or by implication, on the constitutionality of limits placed on how a union expends its own funds, which it has lawfully collected.

Petitioners rely particularly in this regard on *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), in which a divided panel of the Sixth Circuit upheld a state's requirement of annual affirmative authorization of *payroll deductions* for state employee/union members' contributions to their union's political committee. *Washington* Pet. at 25-27; *Davenport* Pet. at 20-25. *Miller*—like the other payroll deduction cases discussed above—thus upheld a limitation on a union's ability to use the *state's payroll services* to assist it in collecting moneys from its members. That is an altogether different matter than the restriction at issue here on the union's political expression financed by moneys that are already, lawfully, in its treasury. As the Washington Supreme Court observed, in responding to the dissent's reliance on *Miller*, Washington law does indeed have a provision like the Michigan statute that the Sixth Circuit upheld, but it is not Section 760:

> [T]he statute at issue in *Miller* is not similar to § 760. Washington's counterpart to the Michigan statute at issue in *Miller* is RCW 42.17.680(3) . . . . Like the Michigan statute at issue in *Miller*, RCW 42.17.680(3) restricts the ability of various groups, including corporations and labor groups, from making direct deductions from an employee's wages. *Miller* did not involve a statute like § 760, and *Miller* is inapplicable to this case.

Pet. App. 25a.[9]

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[9] Prior to 2002, Wash. Rev. Code § 42.17.680(3) required that employees give annual authorization for payroll deductions made to political committees or otherwise designated for political contributions. As amended in that year, Section 680(3) now provides as follows:

C. ***Collective Bargaining Cases.*** Petitioners also invoke the cases holding that a state is not constitutionally required to recognize or to engage in collective bargaining with a union as the representative of its employees. *Washington* Pet. at 19 (citing *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463 (1979)); *Davenport* Pet. at 13-17. But those cases address the extent to which the Constitution requires government to take some affirmative action to cooperate with a union's representational efforts and activities, an issue that is far afield from the issue here—the extent to which government may restrict a union's right to engage in political expression. And in deciding the former issue, the *Smith* line of cases says nothing that bears on the issue here.

D. ***United States v. Boyle.*** The *Washington* petition also asserts the existence of a conflict between the decision below and the D.C. Circuit's 1973 opinion in *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973). *See Washington* Pet. at 23-25. There is no such conflict. *Boyle* was a prosecution of a union officer for making contributions to political candidates from union treasury funds in violation of a federal statute, 18 U.S.C. § 610 (1970), that prohibited the making of such contributions out of union or corporate funds. The *Boyle*

> No employer or other person or entity responsible for the disbursement of funds in payment of wages or salaries may withhold or divert a portion of an employee's wages or salaries for contributions to political committees or for use as political contributions except upon the written request of the employee. The request must be made on a form prescribed by the [PDC] . . . . The employee may revoke the request at any time. At least annually, the employee shall be notified about the right to revoke the request.

In *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 999 P.2d 602, 612-16 (Wash. 2000), the Washington Supreme Court construed Section 680(3) as applying only to payroll deductions made to or designated for a political committee or candidate, holding that it did not restrict a union's use for political purposes of funds from its general treasury.

court rejected the defendant's challenge to the constitutionality of the statute's prohibition on such contributions.

Petitioner would have it that *Boyle* stands for the proposition that any and all federal and state limitations on political contributions or expenditures financed by union or corporate treasury money are constitutional. That is a plain misreading of *Boyle*. Since its seminal decision three years after *Boyle* in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has consistently drawn a distinction between the regulation of political contributions and political expenditures, applying strict scrutiny to the latter but not the former. And the Court has also applied a different standard to statutes restricting contributions in support of or in opposition to ballot propositions than to statutes limiting contributions to political candidates. *First National Bank v. Bellotti*, 435 U.S. 765 (1978). Thus, nothing in *Boyle*, a case involving contributions to political candidates, cuts against the Washington Supreme Court's "strict scrutiny" conclusion that Section 760—which reaches union contributions with respect to ballot propositions, as well as union political expenditures (including even expenditures for a union's internal political communications with its members), but does not reach corporate political expenditures and is not narrowly tailored to any compelling state interest—is constitutionally invalid.

E. ***Federal Election Law Cases.*** Finally, both sets of petitioners assert that the decision below is inconsistent with this Court's jurisprudence under the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 441b. *See Washington* Pet. at 20-23; *Davenport* Pet. at 25-30.

Insofar as the assertion is that the Court's FECA decisions provide support for the conclusion that Section 760 is constitutional, it is unavailing. FECA does strictly regulate contributions to political candidates and certain political expenditures financed by union (or corporate) treasury money. But in light of the constitutional interests involved, FECA

does not go so far as to reach contributions and expenditures with respect to ballot initiatives and referenda, and it *expressly permits* "communications by . . . a labor organization to its members and their families on any subject" (as well as similar corporate communications) and the "establishment" and "administration" of union (and corporate) political committees, notwithstanding that such expenditures are financed by treasury money. 2 U.S.C. § 441b(b)(2)(A), (C). In contrast, Section 760 bans all union (but not corporate) political contributions and expenditures financed by union treasury money—including contributions and expenditures in support of or in opposition to ballot propositions, as well as expenditures for internal political communications with the union's members and for administration of the union's political committee—unless each individual who pays agency fees into the union treasury affirmatively consents to the union's making of such contributions or expenditures.

Given the federal statutory context, in passing on the constitutionality of FECA's regulation of union and corporate political advocacy financed by treasury money, this Court has never had occasion to opine on the validity of a statutory limitation that reaches as far as does Section 760, that does so on a one-sided basis affecting only unions, and that is not narrowly tailored to any compelling governmental interest. And, not surprisingly, nothing the Court has said or done in its FECA decisions so much as suggests that a provision like Section 760 would pass constitutional muster.

To the contrary, it has been a constant in this Court's FECA cases, beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), that all restrictions on political *expenditures* require strict scrutiny and must be "narrowly tailored to serve a compelling governmental interest." *FEC v. Beaumont*, 539 U.S. 146, 162 (2003); *see also, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251-52 (1986). The *Washington* petitioners' heavy reliance on *FEC v. National Right*

to Work Committee, 459 U.S. 197 (1982), *see Washington* Pet. at 20-23, is inapt for this reason. That case involved only a limitation on *contributions to political candidates*—which are not subject to strict scrutiny analysis but only to the requirement that the regulation be "'closely drawn' to match a 'sufficiently important interest.'" *Beaumont*, 539 U.S. at 162 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000)). This Court has repeatedly noted this point in distinguishing *National Right to Work* from cases involving political *expenditures*. *Massachusetts Citizens for Life*, 479 U.S. at 259; *Beaumont*, 539 U.S. at 162.[10]

Indeed, even to the extent Section 760 applies to political *contributions*, it goes far beyond FECA and is subject to strict scrutiny. Unlike FECA, *see* 2 U.S.C. § 441b(a), Section 760 is not limited to political contributions to candidates for public office, but extends to contributions (as well as expenditures) made in support of or in opposition to ballot initiatives and referenda—which is the only kind of political contribution that is at issue here. *See supra* note 5. Such restrictions on political expression are subject to strict scrutiny, and are not supported by the justifications that allow restrictions—like those imposed by FECA—on contributions to political candidates. *First National Bank v. Bellotti*, 435 U.S. 765 (1978).

The heart of the matter here—and the essence of what distinguishes this case from those on which petitioners rely—is that, as the Washington Supreme Court's decision demonstrates, *see supra* Part I.A, Section 760's unique restrictions on union political expenditures cannot withstand the strict scrutiny that the Constitution requires.

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[10] The issue actually decided in *National Right to Work* was, moreover, an exceedingly narrow one, involving the scope and constitutionality of FECA's limitation, to "members" of the corporation, of a corporation's right to solicit contributions to a separate segregated fund. That question has no application to the instant case.

Petitioners' assertion of a conflict between the decision below and this Court's FECA cases thus is misplaced. The Washington Supreme Court's judgment striking down Section 760 in no way threatens any provision of FECA, and is not in conflict with any decision construing that statute.

CONCLUSION

The Petitions for Writ of Certiorari should be denied.

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